

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 248 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and

MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

IBRAHIM UMARBHAI

Versus

BAI JENUBEN SUMARBHAI

Appearance:

MS SEJAL K MANDAVIA for Petitioner

UNSERVED for Respondent No. 1

SERVED BY DS for Respondent No. 4

CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE H.L.GOKHALE

Date of decision: 25/04/97

ORAL JUDGEMENT

1. This appeal is directed against an order passed by the learned Single Judge on February 28, 1997 in Criminal Misc. Application No. 4752 of 1993 in Special Criminal Application No. 891 of 1993.
2. Without expressing final opinion regarding maintainability or otherwise of a Letters Patent Appeal,

in peculiar facts and circumstances and in the light of the nature of the order, we propose to dispose of this appeal on merits.

3. When L.P.A. was placed for admission . we issued notices. The learned counsel for the appellant states that direct service was granted. Even though the respondent nos.1 to 3 were sought to be served, they refused service. Subsequently also they were tried to be served, but they were out of station. In these circumstances, in our opinion, it is appropriate to decide the matter on merits.

4. Opponent Nos.1 to 3 are original applicants. Opponent no.1 Bai Jenuben Sumarbhai filed an application under Sec.125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for her maintenance and her three minor children. The Judicial Magistrate F.C., Junagadh, by an order dt.July 18, 1991 allowed the application and directed the appellant to pay maintenance to the applicants. Being aggrieved by the said order, the husband as well as wife, both moved Sessions Court, Junagadh by filing separate revision applications. It was contended by the husband that the wife was not entitled to maintenance after 'Talaq' was given to her and period of 'Iddat' was over. On the other hand, the contention of wife was that the amount fixed by the learned Magistrate was not adequate. Revision application filed by the wife was allowed whereas revision application filed by the husband was dismissed. Against that order, the present appellant moved this court by filing Special Criminal Application No. 891 of 1993. The said application came up for hearing before the learned Single Judge on June 25, 1993 and the learned Single Judge, on the first day, admitted it by issuing Rule. He also granted ex-parte interim order. The said order reads thus;

"In view of the conflict in decisions of two learned Judges of this Court, namely, Justice M.B.Shah and Justice V.H.Bhariavia in this matter, rule is required to be issued.

Rule- To be heard with Special Criminal Application No. 1320 of 92 and other matters, which are referred to larger Bench. For respondent no.4-State, the learned A.P.P. waives service. Res.No.2 and 3 being minors, notice of Rule may be served on respondent no.1.

In the meantime, the petitioner is directed to deposit half of the monthly

maintenance amount awarded to the opponents as per the order of the learned Judicial Magistrate for the period from the date of the application before the Magistrate Court till the date of the First Appellate Court's order. That amount works out to Rs.12,000/-. I am told that the petitioner has already deposited some amount in the Trial Court. If it is this amount, and the petitioner is directed to deposit the remaining amount as aforesaid in the Trial Court within 3 months from to day. The opponents shall not withdraw the deposited amount till further order of this Court and on this, the executions and implementation of the order of the learned Sessions Judge is stayed."

5. It is thus clear that ex-parte order was passed in June, 1993. The present opponent nos.1 to 3, having come to know about ex-parte interim relief filed an application for vacating the relief on September 10, 1993. The said application called out for final hearing and the above interim order passed earlier was vacated. The relevant part of the order of the learned Single Judge impugned in this Letters Patent Appeal reads as under:

"Thus the point at issue in this matter is not the same as has been decided by Mr. Justice M.B. Shah and Mr. Justice V.H. Bhairavia which are referred to in the ad interim order. In the circumstances, the main matter should be separated and be heard independently on its own merits. Besides two of the applicants are minor children whose claim is not governed by the above referred Act and is required to be decided independently on merits...."

6. Dealing with the contention raised on behalf of the husband that once the order had been made by the court, the matter ought to be placed alongwith other matters before the larger Bench and interim relief could not be vacated, the learned Single Judge stated;

"I cannot uphold the contention raised by Miss Mandavia. In the event this court upholds the factum of divorce the matter shall have to be remanded to the trial court for fresh adjudication. In so far as the claim of the minor children is concerned, they are required to

be examined independently. In the circumstances the present petition does not invoke the matters at issue in the matters which are referred to the larger Bench and the main matter need not be heard along with the rest of the matters as claimed by Miss Mandavia. Ad-interim order dt. 25th June, 1993 made on the main matter to the extent that it directs the main matter to be heard with Spl.Cri.Application No.1320/92 and the other matters which are referred to the larger Bench is vacated. The main matter is ordered to be separated and heard separately.

The injunction granted against the payment of maintenance to the minor children as ordered by the Courts below is also vacated. Further the appellant No.1 shall be at liberty to withdraw the amount of maintenance deposited in the trial court.

Application is allowed to the aforesaid extent."

7. Miss Mandavia, learned counsel assailed this order on various grounds. She submitted that once an order was passed and interim relief was granted, the said order could not have been vacated as the remedy available to the opponents was either to file a review application or to prefer an appeal against that order.

8. We are afraid, we cannot uphold this contention. It is an admitted fact that the order passed by the learned Single Judge was ex parte at admission stage and interim relief was granted. It is also clear that within a short time, an application was filed for vacating interim relief, though it was decided only on February 28, 1997. Moreover, on principle also, we do not agree with the learned counsel for the appellant that if ex parte interim relief is granted, an application for vacating interim relief is not maintainable or that such application can be placed only before the same Judge by treating it as review or the aggrieved party can invoke appellate remedy. In our view, an application to vacate ex-parte interim order is maintainable at law.

9. The learned counsel, however, emphasised the above contention by submitting that while admitting the main matter the learned Single Judge has referred it to a larger Bench in view of conflicting decisions of two learned Single Judges of this Court. (Justice M.B.Shah

(as he then was) and Justice V.H.Bhairavia). The matter was also ordered to be heard alongwith other matters.

10. It was submitted that once the matter was referred to a larger Bench and ordered to be heard alongwith other matters, a Single Judge loses jurisdiction to pass order in such matter. In our considered opinion, this contention is also not well founded. The earlier order was passed by a Single Judge. It was ex parte. It is true that the matter was referred to a larger Bench. It is, however, important to note that interim relief was not granted by a larger Bench but by a Single Judge. According to us, therefore, it was open to another Single Judge to confirm, vacate or modify it after hearing both the parties if the circumstances warrant such a course being adopted. Hence, the contention of Miss Mandavia cannot be upheld.

11. Even otherwise, we are of the opinion that by vacating interim relief, the learned Single Judge has not committed any illegality. In the instant case, from the facts, it is very clear that after hearing both the parties, the trial court awarded maintenance to wife as well as to minor children. The Sessions Court enhanced that amount. If at the instance of the husband, at admission stage, ex-parte relief was granted, it was open to wife to make an application for vacating such order and it was indeed open to the learned single Judge to do so if he was satisfied that interim relief required to be vacated. By vacating interim relief, no illegality has been committed by the learned Single Judge. Hence, even that contention also does not carry the matter further.

12. The last contention of Miss Mandavia, however, is well founded. When the learned Single Judge at the time of admission passed an order directing the office to place the matter (Special Criminal Application No. 891 of 1993) alongwith other matters for hearing, in our opinion, the learned Single Judge ought not to have interfered with that order by observing that the facts of the present case were different from those cases. The order passed by the learned Single Judge earlier was a judicial order passed by a coordinate court and it ought not to have been interfered with by a coordinate court. Hence, to that extent, the appeal deserves to be allowed. The direction of the learned Single Judge in the impugned order that Special Criminal Application No. 891 of 1993 will be separated and will not be placed alongwith Special Criminal Application No.1320/92 is hereby set aside and it is ordered that as per order passed by the learned Single Judge on June 25, 1993 in Special Criminal

Application No.891 of 1993, the office will place that petition for hearing alongwith Special Criminal Application No.1320 of 1992 and allied matters.

13. For the foregoing reasons the appeal is partly allowed to the extent indicated above. In the facts and circumstances of the case, there shall be no order as to costs. Other part of the order stands confirmed.
